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DISTRICT COURT

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DISTRICT OF UTAH

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

BY: DEPUTY CLERK

MARK TECHNOLOGIES CORP.,

Plaintiff,

vs.

UTAH RESOURCES
INTERNATIONAL, INC., et al.,

Defendants.

MEMORANDUM DECISION AND
ORDER

Case No. 2:03CV831DAK

This matter is before the court on Defendants Inter-Mountain Capital Corporation ("IMCC"), Stuart B. Peterson's motion to dismiss, and Defendants Utah Resources International Inc. ("URI"), John Fife, and Lyle D. Hurd, Jr.'s motions to dismiss and joinder in motions to dismiss filed by IMCC and Peterson. A hearing on the motion was held on March 10, 2004. At the hearing, Plaintiff was represented by Reid W. Lambert, and Defendants were represented by Rebecca S. Parr. The court took the motions under advisement. The court has considered carefully the memoranda and other materials submitted by the parties, as well as the law and facts relating to the motion. Now being fully advised, the court renders the following Memorandum Decision and Order.

BACKGROUND

In April 1996, Fife and IMCC executed a Letter of Intent with three members of URI's then-Board of Directors to purchase a controlling number of URI shares. Several parties filed

lawsuits against URI, which were collectively negotiated and settled. MTC was one of these parties and it played a prominent role in the negotiations and settlement.

On June 26, 1996, the various parties, including MTC, entered into a Settlement Agreement under which IMCC was permitted to purchase a controlling interest in URI. As a part of the Settlement Agreement, URI and IMCC also entered into a Stock Purchase Agreement, which was incorporated into the Settlement Agreement by reference. Paragraph 1.f of the Settlement Agreement states that the Stock Purchase Agreement is “incorporated” into the Settlement Agreement. The integration clause, in paragraph 11.d, also states that the exhibits to the Settlement Agreement are “incorporated herein.” The Stock Purchase Agreement is an exhibit to the Settlement Agreement. However, URI and IMCC are the only parties to the Stock Purchase Agreement.

URI and IMCC also executed a Promissory Note reflecting the terms of the Stock Purchase and Settlement Agreements. The Stock Purchase Agreement references the Note at Article I, Section 1.4 and the Note is attached as an exhibit to the Stock Purchase Agreement. All exhibits to the Stock Purchase Agreement were incorporated into the Stock Purchase Agreement by reference. The Purchase Agreement sets forth the terms of the Note and states that by agreeing to the terms of the Stock Purchase Agreement the parties agree to the terms of the Note. The Note was secured by a pledge of IMCC’s URI stock.

Under the Stock Purchase Agreement, IMCC was required to pay a significant sum for its controlling interest, with 15% of the purchase price paid at closing, and the remaining amount due and payable by August 1, 2001. Prior to the August 1, 2001 deadline, the URI Board of Directors extended the due date for Fife’s payment until August 1, 2003, agreed to a reduced

partial payment from IMCC, and released IMCC's stock as collateral on the Note and substituted other collateral. On August 1, 2003, the URI Board of Directors granted IMCC another extension until October 1, 2003. IMCC made some of the interest payments on the original Note.

MTC brought this action alleging a breach of the Settlement Agreement based on IMCC's failure to make all of the required payments to URI under the Purchase Agreement and Note. MTC also brings a claim for rescission of the Stock Purchase Agreement and a claim for specific performance compelling IMCC and Fife to comply with the terms of the Settlement Agreement by paying URI all amounts due under the Purchase Agreement and Note.

Currently there are two other lawsuits by MTC against URI and IMCC pending in Utah state court. Another lawsuit between some, but not all, of the named parties in this action has been decided in state district court and by the Utah Court of Appeals.

DISCUSSION

Defendants IMCC and URI's Motions to Dismiss

IMCC and URI argue that MTC cannot establish any of its three claims—breach of contract, rescission, and specific performance—because it is not a party to or intended beneficiary of the Stock Purchase Agreement or Promissory Note. It is well established contract law that only parties to a contract or intended beneficiaries have standing to sue under the contract. *See Shire Development v. Frontier Investments*, 779 P.2d 221, 222-23 (Utah App. 1990). However, MTC argues that IMCC and URI's breach of the Promissory Note and Stock Purchase Agreement is a breach of the Settlement Agreement, to which it is a party. MTC contends that the substantive terms of the Stock Purchase Agreement memorialized in the Promissory Note are

precisely the consideration for which MTC bargained in the Settlement Agreement.

The Stock Purchase Agreement was expressly incorporated as part of the Settlement Agreement. Under Utah law, contracting parties may incorporate other documents by reference and the documents become part of the contract. *Consolidated Realty Group v. Sizzling Platter, Inc.*, 930 P.2d 268 (Utah App. 1997). In *Zions First National Bank v. Allen*, 688 F. Supp. 1495 (D. Utah 1988), the court held that a forum selection clause in a partnership agreement could be enforced against defendants who signed a subscription agreement that incorporated the partnership agreement by reference. Also, in *Iadanza v. Mather*, 820 F. Supp. 1371, 1386 (D. Utah 1993), the court held that where an interrelated document is intended to be incorporated by reference as part of the same transaction, the contracts are to be construed as a whole.

Construing these contracts as a whole, MTC is a party to the Settlement Agreement and the Stock Purchase Agreement is clearly incorporated into the Settlement Agreement. The Promissory Note is also incorporated into the Stock Purchase Agreement. Therefore, MTC has standing to sue for a breach of the Settlement Agreement.

URI and IMCC further argue that even if the Stock Purchase Agreement and Promissory Note are incorporated into the Settlement Agreement, MTC would have to show a breach of the obligations in the Settlement Agreement. Instead, they assert that MTC raises only allegations that there has been a breach of the Promissory Note. However, MTC has stated its claims as a breach of the Settlement Agreement and has argued that the Stock Purchase Agreement and Promissory Note were part of the consideration for the Settlement Agreement. Therefore, MTC has stated a breach of contract claim under the contracts.

This court's decision with regard to MTC's standing is buttressed by the Utah Court of

Appeals previous decision that MTC had standing to sue under the Stock Purchase Agreement. Whether or not this court is bound by the Utah Court of Appeals' decision under the doctrine of collateral estoppel, the court has already concluded that contract law and the contract language mandate a consistent finding. Therefore, it is unnecessary to determine whether collateral estoppel applies in this instance. As a party to the Settlement Agreement, MTC has standing to sue for a breach of the incorporated agreements.

IMCC also argues that MTC has suffered no damages and has no claim under the Promissory Note, and this court should dismiss the claim with prejudice. However, the court cannot make such a finding as a matter of law at the motion to dismiss stage. Accordingly, the court denies URI's and IMCC's motions to dismiss.

Defendants Stuart B. Peterson, John Fife, and Lyle D. Hurd, Jr's Motions to Dismiss

The individual defendants, Stuart B. Peterson, John Fife, and Lyle D. Hurd Jr., argue that MTC's Complaint fails to identify any wrongs committed by the individuals and that such claim should have been brought as a derivative action. MTC acknowledges that the individual defendants, although seemingly named in their individual capacities, are named only in their capacities as directors of URI. MTC asserts that all members of the Board were named in the Complaint because the breach of contract claims are binding on the Board as agents of the company, because any award may be enforceable against them, and because injunctive relief granted by the Court would be binding upon, and ultimately carried out by, the Board.

However, any judgment or order that could potentially be entered by this court against URI would also be binding on its board of directors. Each individual member need not be named in the action. In addition, throughout the pendency of the action, the individual members

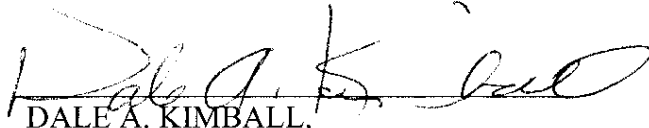
of the board will likely change. For example, Defendant Lyle D. Hurd, Jr. asserts that he is no longer a member of the board. Therefore, the court concludes that naming the individual defendants in their capacities as members of the URI Board of Directors is unnecessary to give proper effect to any remedy. Therefore, the individual defendants are dismissed from this action.

CONCLUSION

Based on the above reasoning, Defendants IMCC and URI's motions to dismiss are DENIED, and Defendants Peterson, Hurd, and Fife's motions to dismiss are GRANTED.

DATED this 15th day of March, 2004.

BY THE COURT:


DALE A. KIMBALL,
United States District Judge

United States District Court
for the
District of Utah
March 16, 2004

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:03-cv-00831

True and correct copies of the attached were either mailed, faxed or e-mailed by the clerk to the following:

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